



BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The memorandum opinion of the District Court (R. 24), the findings of fact (R. 34), and the conclusions of law (R. 35) are printed in full in the record, but are not reported.

The opinion of the Circuit Court of Appeals is printed in full in the record (R. 54-59) and is reported in 142 Fed. 2nd 310. No opinion was filed upon denial of the petition for rehearing.

Jurisdiction and Statement of the Case.

The presentation of these in the preceding Petition is hereby adopted and made a part of this Brief.

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In holding that a gift must be "immediate" in order to qualify for the gift tax exclusion.
2. In refusing to give effect to majority control as an answer to the accumulation argument.
3. In refusing to give effect to the liquidation purpose on questions of construction.
4. In relying, in its accumulation conclusion, on obstacles to enjoyment that were not created by the trust.
5. In refusing to give effect to the Congressional intent that future interests be limited to cases involving difficulty in valuing.

6. In holding that the trustees could use income for building construction.
7. In holding that the trust involved accumulation.
8. In reversing the judgment of the District Court.

Summary of Argument.

The "immediacy" test adopted by the Circuit Court of Appeals is unworkable and in conflict with decisions from other circuits. The definition of future interests in the Treasury Regulations needs clarification. The holding that our gifts involve accumulation despite majority power to prevent accumulation involves misapplication of this Court's Ryerson decision. The Circuit Court of Appeals insistence on looking "at the form" instead of at the liquidation purpose conflicts with other cases. To the extent that obstacles to present enjoyment are due to the non-liquidity of the assets, they have no weight in supporting the Circuit Court of Appeals' accumulation conclusion. The Howe trust does not create a difficulty in valuing which this Court in the Pelzer case held to be the primary test. The purpose of our gifts is present. The details are consistent with this purpose. Our Circuit Court of Appeals is squarely in conflict at all important points with the latest decision in the field. The confusion exhibited by the meaningless definition of future interests in the Treasury Regulations and by court adoption of conflicting tests calls for action by this court.

ARGUMENT.

I.

The "immediate enjoyment" test adopted by the court below is in conflict with all of the decisions in which gifts in trust have been held to be present.

The opinion of the Circuit Court of Appeals says (R. 57): "The critical question * * * is whether the donees * * * acquired an interest capable of present and immediate enjoyment or whether it was one 'limited to commence in use, possession, or enjoyment at some future date or time.' " The closing quote within the quote is from the Treasury Regulations. It amounts to defining a future interest as an interest that starts in future. Hence it adds nothing and can be ignored except as it demonstrates a need for clarification by this Court. It follows that *the* test adopted by the Court is that of "immediate enjoyment."

The fact that the adoption of immediacy as a test was not unimportant, or a mere matter of oversight, is demonstrated by the fact that it was argued pro and con. Opposing counsel quoted with approval passages seeming to require that a gift in order to be "present" must be "immediate," "unrestricted," "absolute" and "unconditional." We demanded (our Brief p. 28) that counsel either adopt these absolutes or abandon them. We said at p. 27:

"The reason why counsel do not commit themselves is that each of these words applied in its ordinary sense would result in pronouncing *all* trusts to be future, contrary to the undeniable fact that if Congress had meant such a result it would have said so

and to the fact that many trusts have been held to be "present." Consider, for example, the word 'immediate.' The primary meaning as given in the Oxford dictionary is 'not separated by any intervening medium.' This is applied to a person or thing in its relation to another. In this sense, all gifts in trust are 'mediate' in contrast with ordinary direct gifts which are 'immediate.' If we take the derivative meaning of 'occurring at once, without delay' we are again confronted with the difficulty that no trust can satisfy the word literally. Some delay is inevitable if only for the manual operations of receiving, making record entries, and distributing. We must conclude that what is meant is a Pickwickian immediacy. Similarly no beneficiary has 'unrestricted' rights in the trust res; he cannot go to the trustee's office, take away the securities and sell them. Even more clearly the rights of the beneficiary of an active trust are never 'absolute,' in fact the trouble with each of these words is exactly that they are absolute words and therefore unworkable as tests in a field that is shown by the holdings to be non-absolute. Opposing counsel's thinking would be straighter if they would try to use in their tests only words that can have general application."

Under these circumstances, it can hardly be said that the Court could have adopted immediacy as a test unless it was important to the Court's thinking and to the decision of the case.

While the word "immediate" was not employed in formulation of the test in *U. S. v. Pelzer*, 312 U. S. 399, it was employed in *Commissioner v. Gardner* (C. C. A. 7), 127 Fed. 2nd, 929, 931, and *Commissioner v. Lowden* (C. C. A. 7), 131 Fed. 2nd, 127, 128.

It is a matter of common knowledge of which we ask that this court take judicial notice that an abnormal proportion of tax cases are decided by the Circuit Court of

Appeals in favor of the Government, and that the belief is widely held that this is due to an agreement or understanding that the Government will appeal only selected cases, and the courts will accordingly give the Government the benefit of any doubt on cases that are taken up. We submit that such a procedure would involve a *pro tanto* abdication of the judicial function denying due process of law to the taxpayer. The situation is rendered additionally delicate by the fact that Circuit Court of Appeals judges depend for promotion in part on the good will of Government counsel.

We further submit that meaningless tests like "immediacy" would facilitate the supposed practice. Hence they encourage the belief above referred to. They contribute nothing to reasoning but lend an air of plausibility to decisions otherwise difficult to support. It is important that this court clarify the position that it took in the *Pelzer* case and lay down a workable test or tests that can displace these weasel words.

Since no gift in trust is "immediate" in either the original or the derivative meaning of the expression, it follows that the decision of our Circuit Court of Appeals is in conflict with all of the cases in which gifts in trust have been held to be present rather than future for gift tax purposes. See for example, *Commissioner v. Brandegee* (C. C. A. 1), 123 Fed. 2d 58, and *Charles v. Hassett* (D. C. Mass.), 43 Fed. Sup. 432. Other cases are cited and summarized in C. C. H. Gift Tax Service, Secs. 3965.361 to .368, inclusive.

II.

The holding that the gifts involve accumulation despite provisions for majority control involves misconstruction of and misapplication of *Ryerson v. U. S.*, 312 U. S. 405.

As we understand it, the Circuit Court of Appeals admits that an absolute right of a single beneficiary to terminate a trust would be a complete answer to an accumulation argument. This was expressly conceded in the *Ryerson* case. The distinction attempted to be drawn is that the right to terminate our trust is dependent on majority action. Our Circuit Court of Appeals opinion says "This at once raises a contingency." Surely this betrays a shocking lack of confidence in the process relied on in a democracy for getting all kinds of business done.

The *Ryerson* case does not control ours since it did not involve majority action, and since there is a suggestion in the opinion in that case (p. 408) that "the joint power was not for the joint benefit of the donees of the power." In our case the power *was* for the joint benefit. All of the donees were in the same relationship to the trust and would have the same motives for desiring termination and for acting to that end.

In addition to the foregoing point that the majority control provisions *ipso facto* negate accumulation, they confirm the liquidation purpose of the donor, and thus contradict our Circuit Court of Appeals' hint in the "earmarks" passage (R. 59) that the trustees' discretion was a subterfuge to cover an intent to create an accumulation trust. If the donor had intended accumulation, she would not have inserted the majority control provisions.

III.

The court's insistence that it must "look at the form" instead of construing the instrument in the light of the liquidation purpose is in conflict with the decisions in which the purpose has controlled close questions of construction.

In all of the cases holding gifts to be future (See C. C. H. Gift Tax Service, Sec. 3965 and following) there was contingency as to the gift or there was an express direction to accumulate; the two grounds relied on in *U. S. v. Pelzer*, 312 U. S. 399. The Howe gifts are vested, not contingent (R. 8, 9, Par. 13), in seven named beneficiaries (R. 5) and there is no direction to accumulate. The Circuit Court of Appeals' finding of an incidental or implied power to accumulate (R. 58) runs counter to the liquidation purpose, and to the authorities summarized below giving effect to the purpose.

In the typical cases in which accumulation has been relied upon to support a "future interest" conclusion, the controlling motive of the donor has been to increase the future estate or to keep unneeded income out of the inexperienced hands of youthful beneficiaries. The *Pelzer* case is a clear cut example. The purpose has operated in the direction of taking money out of the present and putting it into the future. The liquidation purpose in our case is not merely distinguishable from all of these cases. It works in the *opposite* direction. It operates to transform non-liquid assets (that would normally be available only in future) into a fund available for present distribution.

The Circuit Court of Appeals in our case in no way meets these obviously sound and controlling points, but

tries (R. 57) to avoid them by manufacturing a "contingency". The court refers (R. 57) to the 18 year maximum life of our trust and assumes that we rely on the majority control provisions "to meet this long trust duration." Long duration was not the issue presented. It is true that we drew an analogy to the Thellusson acts in which long duration is of the essence, but the points of our analogy were that accumulation is involved in both fields and that in both the power of a beneficiary to take control demolishes any accumulation argument. No question of "long trust duration" is involved in our case nor in any of the gift tax authorities.

The court then mentions the majority power to terminate and says (R. 57) "This at once raises a contingency. * * * Certainly the right of each beneficiary to present enjoyment is contingent upon such majority action." This is an attempt to make a weapon out of a shield. We have argued that majority control gives us a shield against the accumulation point. The maximum result of an attack on majority control would be that we would lose that shield and the accumulation argument would need to be re-examined. Such a re-examination should give effect to the dominant purpose. In *Smith v. Commissioner*, 131 Fed. 2d 254, it was argued that the trustees had discretionary power to accumulate instead of educating the beneficiaries, but the court said "The discretion vested in the trustee was merely as to the means of executing the command of the settlor. It did not give the trustee authority to set aside the express purpose of the trust." Similarly in *Commissioner v. Lowden*, 131 Fed. 2d 127, it was argued that authority to delay income payments made the gift future, but the court overruled this argument on the ground that the purpose of the delay was "not to postpone vesting and enjoyment of income but to provide a convenient distribution procedure."

In holding (R. 58) that "there is nothing in the trust agreement [note that express authority is not claimed] precluding the trustees * * * from using the trust income" the court gives no effect to the fact that par. 10 (R. 8) directs the trustees to distribute income. The two passages can be harmonized. See our Petition for Rehearing (R. 69).

IV.

In relying on obstacles to enjoyment inherent in the non-liquid condition of the assets the court fails to apply the rule that it purports to adopt from *Commissioner v. Glos*, 123 Fed. 2d 548, 550, which rule limits future interest to those in which the postponement relates to interests "which would be forthwith existent" but for the postponement in the trust.

It is our position that, in absence of an issue being raised on this point, the recital in the trust preamble (R. 5) that it was "difficult or impractical to distribute" until the assets had been placed "in condition for liquidation and distribution" is to be taken at face value. In our Petition for Rehearing (R. 71) we presented an offer of further proof.

These difficulties referred to in the instrument mean that before the creation of the trust there were obstacles to present enjoyment analogous to the obstacles which, if *created* by a trust instrument, might make the interests future. Clearly such obstacles to enjoyment did not make the ownership "future" in the donor's hands. To the extent that she transferred her difficulties to the trustees, the boundary between present and future continued as it had been. Obstacles to enjoyment such as the need to devote the income of productive assets to the carrying of non-productive assets clearly would not make the gift future

if the trust instrument was silent on these points. Surely the mere fact that the instrument deals expressly with the liquidation difficulties does not alter the case. This is recognized in the passage quoted by our Circuit Court of Appeals (R. 56), from *Commr. v. Glos*, 123 Fed. 2d 548, 550 (emphasis ours):

“The sole statutory distinction between present and future interests lies in the question of whether there is postponement of enjoyment of specific rights, powers or privileges *which would be forthwith existent* if the interest were present.”

The present enjoyment of which our Circuit Court of Appeals is so tender would *not* be fully “forthwith existent” no matter what the wording of the trust might be.

V.

Since no element of contingency is involved and such postponement as is apparent in the trust is in fact inherent in the nature of the assets, the trust does not create a difficulty of valuing such as Congress had in mind in adopting the future interests wording.

In *U. S. v. Pelzer*, 312 U. S. 399, 403, this court said as to the term “future interests”:

“In the absence of any statutory definition of the phrase we look to the purpose of the statute to ascertain what is intended. * * * Its purpose was * * * the protection of the revenue and the appropriate administration of the tax immunity provided by the statute. It is this purpose which marks the boundaries of the statutory command. The committee reports recommending the legislation declared * * * ‘the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts.’ ”

In our case the gifts are clearly vested (R. 5, 13) so that there is no difficulty in determining the donees. The value of the gift to each of the seven children is simply $1/7$ of the total value of the trust assets. Our case does not come within the purpose that Congress had in mind when it adopted the "future interests" wording.

Our Circuit Court of Appeals has thus decided a federal question in conflict with the applicable decision of this Court.

The confusion evidenced by the definition of future interests in the Regulations as those "limited to commence * * * at some future date * * *" and by widespread adoption of unworkable words such as "immediate" is attributable in part to Government tactics illustrated in our case by the adopting in the Trial Court and in their Circuit Court of Appeals Brief, of the test of whether the gift is "limited by discretion". Counsel abandoned this test at the oral argument, but their persistence in adhering to a test that obviously is meaningless and has no acceptance in the cases prevented the type of careful analysis that would have been possible if the problem had been intelligently presented in the printed brief. Our examination of other Government lower court briefs in this field persuades us that it is the general policy to avoid showing the Government's hand. The briefs exhibit a technique of stating *ex cathedra* supposed legal principles and following the statements by groups of cases not separately analyzed. Where cases are given separate treatment, there is no statement of the facts, but merely a quotation of wording relied upon, stripped from its context. We respectfully suggest that these are tactics of confusion. The mere fact that such tactics have succeeded in other cases, and have temporarily succeeded in our case does not vindicate them. In the interest of the proper functioning of the courts, there should be as early and as complete a showing of the posi-

tion of each party as is practicable. We accordingly respectfully suggest that this court take appropriate steps to discourage this practice.

VI.

Our Circuit Court of Appeals decision is in conflict at almost every point with the most recent decision in the field.

In *Disston v. Commissioner* (C. C. A. 3), 13 L. W. 2049 (decided July 12, 1944 and not yet officially reported) a trust instrument authorized accumulation during minority. The court in holding that this did not render the gift "future" said that these facts "affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but * * * recognition by the donor of what the law, out of solicitude for safeguarding the minor's property, would have interposed in the absence of the donor's express direction * * *. The gifts were the property of the minor donees none the less; and so was the income which recurrently accrued thereon * * *. If the donees should die during their minority, the gifts and all accumulated income would pass as part of their respective estates. * * * Furthermore, for the purpose of determining the recipients of the gifts, the possession of the corpus was in the minor donees within the contemplation of the relevant provision of the Revenue Act."

"Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. * * * The discretion thus reposed neither added to nor took away from the absoluteness of the gifts. * * *"

This case is so closely in point on several of the headings of our brief that we have reserved it to the end. For comparison we will treat the two cases and our comments in parallel columns.

DISSTON	HOWE	OUR COMMENTS
1. Accumulation authorized	Our Circuit Court of Appeals says accumulation. We deny it.	Disston more "future" than Howe.
2. Period during minority	Period 18 years unless majority acts.	Disston more "future" than Howe.
3. "Identity of donees not affected".	Gifts vested in seven.	Cases alike.
4. "Value of the gifts" not "affected" by the accumulation.	No valuing difficulty. See our V.	Alike.
5. The trust "provision was but recognition by the donor of what the law * * * would have interposed".	Our trust was but recognition by the donor of what <i>economic</i> law would have interposed due to non-liquidity. See our IV.	Alike.
6. "Gifts were the property of the * * * donees none the less".	Our provisions similarly deprived the donees of nothing.	Alike.
7. "and so was the income".	Our Circuit Court of Appeals says (and we deny) that income could be withheld (see our III). Even so, it was the property of the donees in the Disston sense.	Disston more "future" than Howe.
8. On death "gifts and all accumulated income * * * part of * * * estates."	Corpus and income both vested.	Alike.
9. "Possession of the corpus * * * was in the * * * donees." for purpose of Revenue Act.	Howe provisions similar.	Alike.
10. "Authority * * * to use * * * income" * * * for the beneficiaries did not make the income any less the minor's property.	See 7 above.	Disston more "future" than Howe.

It is interesting and significant that the case confirms our position that

1. accumulation must be weighed in the light of the trust purpose,
2. an important test is whether the *value* of the gifts, is affected.
3. "recognition" by the donor of the existing fact situation (Disston—minority; Howe-non-liquidity) does not make the gift "future."

Our Circuit Court of Appeals is squarely in conflict with the Circuit Court of Appeals for the Third Circuit on all of these points.

Conclusion.

The decision below is in conflict at numerous points with cases from other Circuits. The defining of "future interest," now in a state of confusion, presents an important question of federal law which should be settled by this Court.

Respectfully submitted,

HERBERT BEBB,
Attorney for Petitioner.

